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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Policies and Rules for the) IB Docket No. 98-21
Direct Broadcast Satellite Service)
)

To: The Commission

COMMENTS

The Wireless Cable Association International, Inc. ("WCA") hereby submits its comments with respect to the Commission's *Notice of Proposed Rulemaking* ("NPRM") issued on February 26, 1998 in the above-captioned proceeding.^{1/}

WCA has a unique and substantial interest in the *NPRM* to the extent that this proceeding will affect, or be affected by, the Commission's parallel review of Primestar's pending application to acquire certain assets of the News Corp. ("Fox") and MCI Telecommunications, Inc. joint venture, which includes a DBS license for 28 channels at 110 degrees W.L.^{2/} The record compiled in the Fox/Primestar matter is directly responsive to what WCA believes are the most critical questions raised in the *NPRM*: (1) whether certain types of DBS ownership patterns raise competitive concerns; and (2) whether there are any non-ownership relationships

^{1/} FCC 98-26 (rel. Feb. 26, 1998).

^{2/} *Application of MCI Telecommunications Corporation and Primestar LHC, Inc., for Consent to Assignment of Direct Broadcast Satellite Authorizations*, File No. 106-SAT-AL-97 (filed Aug. 15, 1997). The Commission has indicated that comments filed with respect to the *NPRM* may also be considered in the Primestar proceeding and incorporated into the record thereto. *NPRM* at ¶ 3 n.10.

in the cable/DBS context that ought to raise competitive concerns.^{3/} As shown in the various pleadings filed by WCA and other alternative multichannel video programming distributors (“MVPDs”) in the Fox/Primestar proceeding, the answer to both questions is a resounding yes.^{4/}

At the outset, WCA wishes to emphasize that it is not unalterably opposed to any cable operator ownership of Primestar, and takes no position as to whether across-the-board restrictions on cable-DBS cross ownership are necessary at this time.^{5/} The fact remains, however, that the cable industry holds overwhelming market power over program suppliers, and that cable MSOs exercise that power through a variety of interrelated economic relationships which operate to prevent wireless cable operators and other alternative MVPDs from having full and fair access to programming. The sheer breadth of those relationships was recently summarized by Matthew Oristano, Chairman and CEO of wireless cable operator People’s Choice TV Corp., before the Commission’s recent *en banc* hearing on cable competition:

[T]here are today alliances between cable and broadcast TV (NBC, Fox, CBS)

^{3/} *NPRM* at ¶ 61.

^{4/} As the Commission is aware, WCA has asked the Commission to impose the following conditions on any approval of the Fox/Primestar transaction: (1) Fox may not refuse to sell nor may it otherwise engage in unfair or discriminatory practices with respect to the sale of Fox programming or packages of Fox programming to alternative MVPDs, regardless of whether the programming at issue qualifies as “vertically-integrated” or “satellite-delivered” under the Commission’s program access rules; (2) Fox may not require an alternative MVPD to purchase cable network programming as a precondition for entering into a retransmission consent agreement with any Fox-owned or Fox-affiliated television station; and (3) the conditions requested by WCA shall apply as long as Fox maintains its investment in Primestar and shall be a further condition to any subsequent approvals (*e.g.*, license renewal, facilities modification) sought by Primestar in the future. Petition of WCA to Deny or, Alternatively, Request for Imposition of Conditions, FCC File No. 106-SAT-AL-97, at 22-23 (filed Sept. 25, 1997) [the “WCA Petition”].

^{5/} See WCA Letter to William F. Caton, Acting Secretary, FCC File No. 91-SAT-TC-97 (filed Aug. 22, 1997).

which create exclusivity, cable and satellite programmers (Murdoch) which create exclusivity, cable and a software company (Microsoft) which create exclusivity, and cable and former cable operators (Viacom) which create exclusivity. The cable industry control of programming, if diagramed with all of its equity, licensing, carriage agreement, and *quid pro quo* relationships, creates a web which has the effect of ensnaring all competitors.^{6/}

In other words, cable-DBS cross-ownership should not be viewed in isolation and solely as an issue of horizontal concentration; rather, the anticompetitive risks associated with cable's entry into DBS can be fully understood only upon consideration of how cable/DBS cross-ownership, *viewed in tandem with cable's existing market power over affiliated and non-affiliated cable programmers*, may worsen the increasingly unfavorable climate for program access currently experienced by non-cable providers.

The facts and circumstances surrounding Fox's proposed investment in Primestar demonstrates why a broader approach to the cable-DBS cross-ownership issue would better serve the public interest at this time. The record in the Fox/Primestar proceeding reflects the following:

- The Fox/Primestar transaction, if approved, will combine into a single DBS entity (1) the largest cable MSOs in the United States and (2) the Fox programming empire, which controls, among other things, the Fox broadcasting network, the FX and Fox News ("FNC") Networks and, directly or through joint ventures with the cable industry, the broadcasting and cable rights to a substantial portion of the most popular national and local sports programming in the marketplace today.^{7/}
- Fox initially attempted to enter the domestic DBS business by partnering with EchoStar, an entity that is completely independent of the cable industry. However, after the cable industry retaliated by refusing to

^{6/} Testimony of Matthew Oristano, Chairman, People's Choice TV Corp, before the Federal Communications Commission re: Status of Competition in the Multichannel Video Industry, at 6 (Dec. 18, 1997).

^{7/} WCA Petition at 2.

discuss carriage of the FX and FNC cable networks, Fox promptly capitulated by abandoning its joint venture with EchoStar in favor of the cable-controlled Primestar.^{8/}

- Fox's proposed investment in Primestar culminates a long series of transactions which Fox has engineered to curry favor with the cable industry and thereby solidify cable carriage of FX and FNC. In particular, pursuant to its cable network affiliation contracts with the Primestar MSO partners, Fox by its own admission has refused to sell FX and FNC to wireless cable operators and other alternative non-DBS MVPDs.^{9/}
- The Commission's current program access rules - - drafted well before the intricate web of relationships between Fox and the Primestar MSO partners could ever have been imagined - - will not protect wireless cable operators and other alternative MVPDs from Fox's persistent refusal to sell its programming or from other anticompetitive conduct that is likely to arise from the Fox/Primestar transaction.^{10/}
- Notwithstanding substantial objections from cable's competitors to Fox's proposed venture with Primestar, to this day Fox has refused to give the Commission the same unequivocal program access commitment that it gave to Congress when it was seeking Congressional support for its venture with EchoStar, *i.e.*, that it would make its programming available to alternative MVPDs on nondiscriminatory terms.^{11/}

Clearly, none of the above-described facts nor resulting threat to program access posed by the Fox/Primestar transaction would have been discovered by only examining the narrow

^{8/} *Id.* at 2-4. Indeed, neither Fox nor Primestar have seriously disputed that Mr. Murdoch turned away from EchoStar and went on bended knee to the Primestar MSO partners after certain cable operators refused to even discuss carriage of the FX and FNC networks. Consolidated Reply of WCA, FCC File No. 106-SAT-AL-97, at 3 (filed Oct. 20, 1997) [the "WCA Reply"].

^{9/} WCA Petition at 14-17; *see also* Comments of Ameritech New Media, Inc., File No. 106-SAT-AL-97, at 16-17 (filed Sept. 25, 1997). Fox readily admits that its refusal to sell FX and FNC to the wireless cable industry was necessary to ensure that cable operators would carry the networks. WCA Reply at 3.

^{10/} WCA Petition at 19-21.

^{11/} WCA Reply at 9.

issue of whether cable ownership of DBS assets, standing alone, would have a chilling effect on facilities-based competition between MVPDs in local markets. Rather, such anticompetitive effects can be discerned only when cable-DBS cross-ownership is viewed as a single strand of a sprawling web of relationships between MSOs, programmers and DBS providers, whose combined effect produces exactly the sort of adverse market conditions which Congress intended to correct in adopting the program access provisions of the 1992 Cable Act.

Accordingly, regardless of whether the Commission ultimately chooses to adopt uniform cable-DBS cross-ownership rules in lieu of a case-by-case approach, the Fox/Primestar matter demonstrates that any Commission analysis of the cable-DBS cross-ownership issue must incorporate certain fundamental marketplace principles beyond “horizontal concentration” if the Commission is to ensure that cable’s participation in DBS does not thwart full and fair competition among all MVPDs. First and foremost, the Commission must remember that MVPDs are in a service-oriented business, and that the service MVPD subscribers are buying is *programming*, not the technology used to deliver that programming. Indeed, Chairman Kennard himself recently acknowledged that “[n]ew entrants seeking to compete against incumbents must have a fair opportunity *to obtain and market programming . . .*,”^{12/} and that “regardless of the method of delivery, where programming is unfairly or anti-competitively withheld from distribution, competition is deterred or impeded.”^{13/} Thus, where cable’s

^{12/} Separate Statement of Chairman William E. Kennard re: *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, FCC 97-423 (rel. January 13, 1998), at 2.

^{13/} Letter from William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions, at 7 (Jan. 23, 1998) [the “Kennard Letter”].

competitors are concerned, the most important “market” implicated by cable’s entry into DBS is the market for programming, and the most important legal and economic issue raised by cable-DBS cross-ownership is whether cable’s participation in DBS creates market conditions that effectively deny cable’s competitors the same access to programming enjoyed by the cable MSOs and/or their DBS interests.

Second, to fully evaluate all possible adverse effects cable-DBS cross-ownership may have on access to programming, the Commission must analyze how cable-DBS relationships interrelate with other cable industry relationships that directly or indirectly bear on program access, *regardless of whether those relationships satisfy the Commission’s technical definition of “vertical integration.”* As recently noted by Chairman Kennard to Congress:

It is probably fair to say that the general conclusion is that any analysis [of program access] should focus on the source of any market power involved (the absence of competition at the local distribution level) rather than on vertical integration itself.^{14/}

Thus, in the cable-DBS cross-ownership context, the mere fact that “vertical integration of national programming services by cable operators has declined slightly” is not decisionally significant.^{15/} The relevant inquiry, WCA submits, is whether the full range of cable/DBS and cable/programmer relationships (“vertically-integrated” or otherwise) collectively produce the same anticompetitive environment which the program access laws were designed to prevent.

^{14/} Kennard Letter at 3. The Chairman went on to confirm that cable’s competitors are being denied access to a growing number of programming services alleged not to be “vertically-integrated” under the Commission’s current technical definition of that term, *e.g.*, MSNBC, Game Show Network, Eye on People, Fox News, Home & Garden Television and TV Land. *Id.* at 1.

^{15/} *NPRM* at ¶ 57.

Third, the Commission should at all times reject the cable industry's now familiar refrain that any program access concerns relating to cable-DBS cross-ownership are best resolved either through the antitrust laws or through the program access complaint process.^{16/} The Commission has already stated that its mandate to consider competitive issues as part of the public interest standard under the Communications Act is "a separate and distinct obligation" from the Department of Justice's responsibility to enforce the antitrust laws, and that the latter in no way precludes the former.^{17/} Further, the Commission has also stated that "there may be anticompetitive effects flowing from a merger which may not be addressed or remedied by the Commission's rules," and that reliance on the program access complaint procedure alone is not sufficient to protect the public interest as a whole.^{18/}

Finally, even if the Commission were inclined to suddenly reverse field and require cable's competitors to seek relief exclusively through the antitrust laws and the program access complaint process, it must be remembered that the effectiveness of those forums will soon be substantially diminished by the sunset of the Primestar consent decrees and the prohibition against exclusive contracts in the 1992 Cable Act. Specifically, most of the provisions of the consent decree between Primestar and the Attorneys General of forty states expired on October 1, 1997, and the restrictions of the consent decree between the United States and Primestar

^{16/} *See, e.g.,* Primestar Consolidated Opposition and Reply Comments, File No. 106-SAT-AL-97, at 31-33 (filed October 9, 1997).

^{17/} *Tele-Communications, Inc. and Liberty Media Corporation*, 9 FCC Rcd 4783, 4785-86 (CSB, 1994).

^{18/} *Id.* at 4786-87.

expire on April 4, 1999.^{19/} Moreover, the 1992 Cable Act's prohibition on exclusive programming contracts is scheduled to sunset on October 5, 2002.^{20/} In other words, the sunset of the Primestar consent decrees and the 1992 Cable Act's prohibition on exclusive contracts means that the Commission will soon be regulating cable-DBS cross-ownership in an environment in which the most fundamental federal program access requirements may no longer exist.

In sum, it is worth noting Primestar's observation that the Commission should not "engage in unworkable and undesirable handicapping and gerrymandering of competition among MVPDs."^{21/} WCA wholeheartedly agrees. It is also true, however, that the anticompetitive effects of cable industry behavior arise from a combination of many types of economic relationships, and not just merely from cable's ownership of DBS assets. The record in the Fox-Primestar proceeding demonstrates that the desired pro-competitive effects of regulating cable-DBS cross-ownership cannot be achieved unless all of those relationships are taken into account and fully evaluated as to their existing and future impact on the ability of cable's competitors to obtain access to programming on nondiscriminatory terms.

^{19/} *Abrams v. Primestar Partners, L.P.*, 1993-2 Trad Cas. (CCH) ¶ 70,403 (S.D.N.Y. 1993).


^{20/} 47 U.S.C § 548(e).

^{21/} Primestar Opposition at 6.

WHEREFORE, The Wireless Cable Association International, Inc. respectfully requests that the Commission resolve the issues raised in the *NPRM* in accordance with the comments set forth above.

Respectfully submitted,

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April 6, 1998

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I, Joy Taylor, hereby certify that the foregoing "Comments" was served this 6th day of April, 1998, by hand delivering a true copy thereof to the following:

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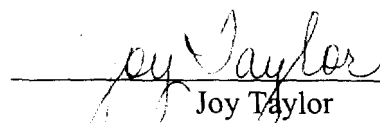
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